

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 8, 2023 at 2:00 p.m.

1.	<u>23-20380-E-12</u> <u>WW-2</u>	TIMOTHY WILSON Mark Wolff	MOTION TO CONFIRM CHAPTER 12 PLAN 5-11-23 [49]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 11, 2023. By the court's calculation, 28 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(8) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1) (requiring fourteen days' notice for opposition). Additionally, Creditors holding priority claims were served on May 30, 2023. By the court's calculation, 9 days' notice was provided.

Parties have not been provided sufficient service. At the hearing, **XXXXXXXXXXXX**

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Confirm the Plan is denied.

The debtor, Timothy C Wilson ("Debtor") seeks confirmation of the Chapter 12 Plan. The Plan provides payments beginning June 25, 2023 as follows: \$4,500 per month for 12 months followed by a lump

sum payment of \$1,650,000 from the sale of Debtor's residence, and a lump sum payment of \$405,000 from the sale of Debtor's bare land. Plan, Dckt 47 § 7.

CREDITORS JANA PROPERTIES, LP AND JACK FARONE'S OPPOSITION

Creditors JANA Properties, LP and Jack Farone (collectively, "Creditors JANA and FARONE") filed an opposition on May 23, 2023. Dckt. 63. Creditors JANA and FARONE object to confirmation on the grounds that:

1. Debtor is not the borrower:

- a. The borrower on Creditors JANA and FARONE's note is Ellen MacDonald, not Debtor. Debtor does not have any contractual relationship with these creditors.
- b. Debtor is attempting to cram-down the loan of Creditors JANA and FARONE with this Plan and modify the interest to either 4% or 7%, making himself the borrower on the loan.
- c. Debtor has provided no law that allows this type of loan modification to an obligation they are not the borrower on.

Debtor obtained record title to the Property subject to the obligation of Creditors JANA and FARONE. Debtor never formally assumed the loan obligation. Debtor has not provided applicable law allowing them to unilaterally modify contractual obligations without first assuming the responsibilities of the borrower.

2. Debtor's treatment of Creditors JANA and FARONE is insufficient:

- a. The *Till* rate is higher than the interest rate Debtor is suggesting.

Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with Debtor to 4.00% or 7.00%. Section 3.11 of the Plan indicates a 7.00% interest rate while additional provisions indicate a 4.00% interest rate. Creditor's claim is secured by a Deed of Trust. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. See *In re Cachu*, 321 B.R. 716 (Bankr. E.D. Cal. 2005); see also *Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. See *Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Additionally, Creditor has addressed risks factors of the Debtor being on their 6th bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 7.75%, plus a 1.25% risk adjustment, for a 9.00% interest rate. The objection to confirmation of the Plan on this basis is sustained. See 11 U.S.C. § 1225(a)(5)(B)(ii).

- b. The Plan does not include the correct loan balance owed to Creditors JANA and FARONE, which is now \$265,148.37.

Creditor's Proof of Claim is filed for \$265,148.37. Proof of Claim 5-1. Debtor's Plan indicates Creditor's claim is only for \$220,000.00. Plan, Dckt. 47 § 3.11. Pursuant to §3.04, the Proof of Claim, not the Plan, shall determine the amount and classification of a claim. Absent the Plan providing the correct amount of the Claim, Debtor cannot comply with the Plan under 11 U.S.C. § 1225(a)(6).

3. Debtor's proposed Plan is infeasible:

- a. Debtor's proposed Plan is infeasible because Debtor is scheduled to face criminal trial that could lead to incarceration and monetary fines.
- b. The income projected is insufficient to make the required *Till* payments to Creditors JANA and FARONE, as well as the secured claim of Umpqua Bank.

The court agrees that the above creates some concerns about the feasibility of the Plan. 11 U.S.C. § 1225(a)(6). Creditor's Declaration indicates there is a criminal case against Debtor set for trial July 31, 2023. Declaration, Dckt. 64. However, the funding of this Plan is from the orderly sale over the next twelve months of two real properties owned by Debtor. Even if ultimately incarcerated, a plan administrator can market and sell the property, and pay off the secured claims, as Creditors, other creditors in this case, any surplus value for Debtor. However, as discussed below, a serious financial question exists whether the properties may be sold for values in excess of the secured claims.

The following is a chart showing the properties to be sold, the values stated by Debtor, and the secured claims filed, or listed on Schedule D if no proof of claim has been filed, relating to the properties to be sold.

16030 Schaefer Ranch Road Residence		16030 Schaefer Ranch Road Bare Land		Amador County Bare Land
\$1,850,000		\$375,000		\$15,000
(\$31,134)	Property Taxes			
(\$1,491,210)	Umpqua Bank DOT	(\$265,148)	Jana Properties, LP and Jack Faraone DOT	
(\$56,606)	Cal Tax Lien			
(\$75,055)	Commercial Equipment Judgment Lien			

(\$10,325)	Ellen Start, dba ABC Business Company Abstract of Jdgt			
(\$8,250)	Ellen Start, dba ABC Business Company Abstract of Jdgt			
(\$44,481)	Holt of California Jdgt Lien			
(\$4,922)	Maricella Fiscus Jdgt Lien			
(\$20,879)	Pape Machinery, Inc. Jdgt Lien			
(\$94,000)	Shirley Sittner DOT	(\$44,073)	George and Sylvia Nlu DOT	
		(\$89,375)	Shirley Sittner DOT	
(\$45,889)	Steve Stoelk Jdgt Lien			
(\$115,259)	Susquehanna Commercial Finance, Inc. Abstract of Jdgt			
(\$33,085)	Wells Fargo Bank Jdgt Lien			
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Rough Calculation of Gross Value Over Secured Claims				
(\$181,095)		(\$23,596)		\$15,000

4. The proposed Plan is not fair and equitable to creditors:

- a. The proposed Plan only proposes a monthly payment of \$500.00 to Creditors JANA and FARONE, which is insufficient to pay even the interest rate at 4%.

The additional provisions indicate Debtor will make a monthly payment of \$500 to Creditor. Even if Creditor were to agree to the 4% interest rate, the \$500 per month payment does not even cover this interest. The Plan provides to sell the Property, however, there is no indication that the Property will

be sold. The insignificant Plan payment, when the loan matured 13 years ago, indicates a lack of good faith on behalf of the debtor. 11 U.S.C. § 1225(a)(3).

- b. Debtor estimates the Property's value, which will be used to fund the Plan, at \$375,000. This value is insufficient to pay all secured claims.

Debtor's secured claims against the Property total \$398,596.00. Debtor values the Property at \$375,000. Debtor intends to use the proceeds of the sale to pay off all secured claims. The Plan does not seem feasible.

TRUSTEE'S OPPOSITION

The Chapter 12 Trustee, Michael H. Meyer ("Trustee"), filed an opposition on March 24, 2023. Dckt. 71. Trustee objects on the following grounds:

1. Duration of Debtor in Bankruptcy:

- a. This is Debtor's sixth bankruptcy case in the last 11.99 years. Debtor has been in bankruptcy for 85% of the last 11.99 years.

A Debtor's repeat bankruptcy filing indicates the Plan is not feasible and is reason to deny confirmation. 11 U.S.C. § 1225(a)(6).

2. 341 Meeting of Creditors:

- a. The Meeting of Creditors was held and continued to have schedules amended, operating reports filed, and documents requested provided and the Chapter 12 Plan filed.

Debtor's Meeting of Creditors has been continued to have various documents amended and filed. A failure to amend and file documents as well as complete the 341 meeting, indicates a failure to cooperate as well as the inability to address the feasibility of the Plan. *See* 11 U.S.C. § 521(a)(3); 11 U.S.C. § 1225(a)(6). That is cause to deny confirmation. 11 U.S.C. § 1225(a)(1).

3. Chapter 12 Documents Incomplete:

- a. Creditors holding abstracts - Debtor lists six creditors as holding abstracts on Debtor's real property, however, none of these creditors are listed in the preliminary title report received from Trustee.
- b. Official Form 106-1 - Debtor filed one statement of Business Income and Expenses for multiple businesses. Each property and business shall have a separate statement.

- c. Debtor's Business Income and Expenses (Dckt. 1) indicate an anticipated income of \$12,500. Debtor's Attorney emailed a new Business Income and Expense estimating an additional \$10,000 per month in future income. Debtor has not filed this with the court.

Incomplete documents indicates a failure to cooperate and inability to assess the feasibility of the Plan. *See* 11 U.S.C. § 521(a)(3); 11 U.S.C. § 1225(a)(6). That is cause to deny confirmation. 11 U.S.C. § 1225(a)(1).

4. Chapter 7 Liquidation Analysis:

- a. Debtor's Schedules are largely incomplete and therefore it cannot be determined whether Debtor satisfies the Chapter 7 Liquidation Analysis.

Incomplete documents indicates a failure to cooperate, inability to assess the feasibility of the Plan, and inability to determine whether Debtor passes the liquidation analysis. *See* 11 U.S.C. § 521(a)(3); 11 U.S.C. § 1225(a)(6); 11 U.S.C. § 1225(a)(4). That is cause to deny confirmation. 11 U.S.C. § 1225(a)(1).

5. Failure to Provide for Value of Claim:

- a. It appears that Trustee is contesting all secured claims will be paid a significant amount more than owed at the date of filing. Objection, Dckt. 71 at 6:1-4. Trustee states this is in violation of 11 U.S.C. § 1225(a)(5)(B)(ii).

The court notes, if this is Trustee's contention, this is not in violation of 11 U.S.C. § 1225(a)(5)(B)(ii), as (a)(5)(B)(ii) requires only that the value, as of the effective date of the Plan, is **not less** than the allowed amount of such claim. However, Debtor should not be overpaying claims.

6. Not Proposed in Good Faith:

- a. Debtor's failure to disclose assets and liabilities suggests the Plan has not been proposed in good faith.

7. Failure to Make Plan Payments:

- a. Debtor may only have an average monthly income of \$3,699.67, as Debtor included a one-time payment of \$8,000 from PG&E in their Monthly Operating Report to "fix roads." \$3,699.67 under-funds the Plan.

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1225(a)(6). Trustee estimates Debtor's Plan payments should be at least \$5,163.04, while their net income may be only \$3,699.67. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

CREDITOR UMPQUA’S OPPOSITION

Creditor Umpqua Bank (“Umpqua”), filed an objection to confirmation on May 25, 2023. Dckt. 73. Umpqua objects on the following grounds:

1. Amount of Umpqua’s Claim:

- a. Umpqua’s Proof of Claim is for \$1,492,120.15. Additional provisions reference this figure, however, the body of the Plan only references \$1,000,000.

Creditor’s Proof of Claim is filed for \$1,492,120.15. Proof of Claim 3-1. Debtor’s Plan indicates Creditor’s claim is only for \$1,000,000, however, the additional provisions note the correct claim amount. Plan, Dckt. 47 § 3.11, § 7. The terms should be consistent throughout the Plan to ensure Debtor can comply with the Plan.

Pursuant to §3.04, the Proof of Claim, not the Plan, shall determine the amount and classification of a claim. Absent the Plan providing the correct amount of the Claim, Debtor cannot comply with the Plan under 11 U.S.C. § 1225(a)(6).

2. Interest Rate:

- a. Debtor’s Plan provides a 4.25% interest rate for Umpqua’s claim. This is below the *Till* rate. Umpqua lists significant risks that are unique to this case which they argue favor an increased interest rate.

As the court has noted previously, the court agrees that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Additionally, Creditor has addressed risks factors of the Debtor being a repeat filer, being in their sixth reorganization case, being three years beyond their maturity date, Debtor’s Plan hinging on Debtor’s ability to sell their real property, and Debtor facing a ten-year minimum mandatory incarceration, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 7.75%, plus a 1.25% risk adjustment, for a 9.00% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1225(a)(5)(B)(ii).

3. Insufficient Plan Payments:

- a. The Plan proposes to pay only \$2,650.00 to Umpqua’s claim. This is not sufficient and does not even cover interest on the \$1,492,120.15 claim.

The additional provisions indicate Debtor will make a monthly payment of \$2,650.00 to Creditor. The Plan provides to sell the Property, however, there is no indication that the Property will be sold. The Plan payment is insignificant compared to the \$1,492,120 claim. Even if this claim were amortized over 30 years with 0% interest, Debtor would need to pay \$4,145 per month. The payment indicates a lack of good faith on behalf of the debtor. 11 U.S.C. § 1225(a)(3).

4. **Infeasible Plan:**

- a. The Plan is infeasible because Debtor cannot pay the dividend promised to unsecured claims.
- b. Debtor's Plan proposes payments for \$4,500 per month. The actual payments in the Plan add up to \$4,750 per month and with Trustee fees the payments are estimated at \$5,163.04 per month. Debtor has projections of income, outlined in Dckt. 60, however, Debtor does not provide cash flow projections to determine if the Plan is feasible.
- c. Debtor's Amended Income and Expense Statement indicates \$0 in Gross Business Income in the previous 12 months. Debtor is estimating \$22,187.00 in estimated future gross income. With expenses, Debtor is estimating an average net income of \$14,170.00. Creditor cannot determine whether projections for business are reasonable without Debtor's actual income amounts from the prior 12 months.
- d. Debtor's tax returns from 2020 and 2021 indicate significant income from the sale of timber. Debtor states in their feasibility declaration that they are not anticipating selling timber. Debtor does not provide an explanation of how they are going to replace the substantial income.
- e. Debtor's Amended Schedule I indicates a net income from rental property, business, or farming operations of \$17,170.00. Debtor's prior Chapter 13 case indicates only a \$6,000 net income in this category. Case No. 22-22415, Schedule I Dckt. 10 at 11. Debtor does not indicate how they have increased their net income by over \$11,000, when there was only five (5) months between filing Debtor's previously dismissed Chapter 13 case and the current case.
- f. Umpqua provides Debtor's Residential Listing Agreement where Debtor has listed their real property commonly known as 16030 Schaefer Ranch Rd, Pioneer, California ("Property") for a price of \$2,250,000. Exhibit B, Dckt. 75. Debtor's Modified Residential Listing Agreement lists the Property at \$2,125,000. Exhibit C, Dckt. 75. Umpqua notes, in Debtor's Chapter 13, Debtor lists the Property as having a value of \$772,000. Case No. 22-22415, Schedule A/B, Dckt. 12. Debtor has not provided information as to why the Property's value has increased in the five (5) months between the filing of the Chapter 13 case and Chapter 7. When Debtor was asked about the listing price of \$2,125,000, Debtor was not able to provide an explanation. The

court notes, Debtor's current case indicates the Property has a value of \$2,225,000. Schedule A/B Dckt. 1.

The court agrees that the above concerns that the Plan is not feasible under 11 U.S.C. § 1225(a)(6). Without Debtor amending their Chapter 12 documents, and providing explanations to various discrepancies, the court cannot address the feasibility of the Plan and whether Debtor will be able to make Plan payments and comply with the Plan. This is reason to deny confirmation. 11 U.S.C. § 1225(a).

Thus, the Plan may not be confirmed.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Chapter 12 Plan filed by Timothy C Wilson ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm is denied, and the proposed Chapter 12 Plan is not confirmed.